United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1189

B P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No.75-1189

UNITED STATES OF AMERICA,
Appellant,

-against-

DANIEL MACKLIN,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

UNITED STATES COURT OF APPEALS
FILED
JUL 9 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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TEXT:

WRIGHT, Federal Practice and Procedure (Criminal) Section 538 8,9,10

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BRIEF FOR DEFENDANT-APPELLEE

PRELIMINARY STATEMENT

The United States appeals from an order of the District Court for the Eastern District of New York (Mishler, Ch. J.), entered on January 29, 1975, which granted the motion of the defendant Daniel Macklin to dismiss the indictment upon the

ground that the term of the Grand Jury which returned the indictment had been extended improperly. See UNITED STATES v. FEIN, 504 F.2d 1170 (C.A. 2, 1974). The District Court, in the same order also granted the motion of the defendant, Daniel Macklin, to withdraw his plea of guilty to two counts of the indictment, while denying the corporate defendant the same relief.

The government in the preliminary statement to its brief has accurately described the reasoning of the District Court in making this determination. It states that the court found that the "indictment returned by the improperly extended Grand Jury was 'void ab initio', that the defect went to the jurisdiction of the District Court and did not come within the waiver provisions of Rule 12(b)(2). To justify seeking a writ of mandamus, the government suggested that the Court in permitting the individual defendant to withdraw his plea of guilty, but denying the same relief to the corporate defendants, did not thereby exercise its discretionary power to do so, but rather relied upon an erroneous legal conception.

Thereafter in its preliminary statement the government sought to explain its rationale for seeking the relief of both the mandamus and the appeal. Its contentions require response:

Firstly, it complains that the statute of limitations on

the offenses charged in the indictment has run. It should be noted that at the time of defendant's motion, the statute of limitations had not as yet expired on the acts charged. The government ought not complain about the statute of limitations since it chose voluntarily to allow the statute to run. In a manner of speaking, the government has waived any complaint on this ground.[1]

Secondly, the government states that the defendant's plea here was entered pursuant to a plea bargain, which explained the delay in sentencing. Some three months after the indictment the defendant, pursuant to a plea bargain, pleaded guilty to two counts and agreed to cooperate with the government. The defendant did cooperate, he fully kept his part of the bargain and the government derived benefit thereby. It was for this reason, among others, that the government concurred with or requested adjournments of the sentencing. It would appear that they did very well by their bargain since they obtained the cooperation of the defendant based upon his plea to a void indictment.

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1 During the oral argument on the motion, Judge Mishler queried counsel with regard to the statute of limitations. It was conceded that the same had not then run. The government freely chose to contest the motion on grounds of waiver rather than re-indict even though it acknowledged that the Fein case established that the very same Grand Jury was involved in both cases and that Fein had already established that it had no power to indict.

STATEMENT OF FACTS

The defendant was indicted on May 16, 1973 by a Grand Jury which had been impaneled in the Eastern District of New York on March 17, 1971. At the time of the indictment its lawful life had expired by eight months and it then sat pursuant to a second purported extension of its lawful life.

Some three months after the purported indictment the defendant Macklin withdrew his plea of not guilty and entered a plea of guilty to two counts which alleged that the defendant had sought to influence the action of the FHA in approving a mortgage loan application by submitting a contract of sale in 1969 which contained a false statement with regard to the amount of the purchasers' cash deposit. The plea was entered as part of a bargain for the defendant's cooperation and his sentence was accordingly adjourned. During the period of his cooperation and following further adjournments, a decision in the Court of Appeals for the Second Circuit in UNITED STATES v. FEIN 504 F.2d 1170 (C.A. 2, 1974) established that the Grand Jury which had indicted him had been improperly extended. The defendant thereupon filed an application to dismiss the indictment and withdraw his previously entered plea of not guilty. The government now appeals from the Court's decision which granted in part, such relief.

ARGUMENT

POINT I

THE INDICTMENT FILED BY THIS GRAND JURY WAS A NULLITY: THE COURT THUS HAD NO JURISDICTION OVER THE DEFENDANT, WHICH DEFECT COULD NOT BE WAIVED.

Paragraph "1" of the Appellant's brief Point I concedes, "that had the defendant made a timely motion to dismiss this indictment, he was plainly entitled to the relief of the dismissal of the indictment. For there is no dispute that the District Court was without legal authority to empower the Grand Jury, which returned the indictment, to sit beyond its original eighteen month term". [2]

The only distinction which the government seeks to draw between Fein and the case at bar relates to the issue of waiver. The government says that the defect, i.e. that the Grand Jury had no power to indict because its life had expired, was the kind of defect which could be and was waived by the defendant's plea.

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2 See Appellant's brief page 5.

However, UNITED STATES v. FEIN supra, held, not only that the indictment was invalid, but also that the defect was not merely a technical irregularity which could be waived by the entry of a guilty plea but rather an error "that goes to jurisdiction". To contend as does the government that the defect was one which could be waived, the government is compelled to argue that the Court of Appeals was wrong in the Fein case.

It is the government's argument which is wrong, however. The question is not whether the defendant made a timely or untimely application as the government puts its Point I. Rather, the issue is whether this indictment was void ab initio. If the District Court, in following Fein, is correct in holding that this Grand Jury had no power to indict, beyond its lawful term, then the Court never obtained jurisdiction over this defendant. Such a fundamental defect can never be waived and is thus always timely made. Hence the waiver provisions of Rule 12(b)(2) do not apply.

Rule 12(b)(2) of the Federal Rules of Criminal Procedure states that defenses and objections based on defects in the institution of the prosecution or in the indictment or information <u>other than that it fails to show jurisdiction in the Court</u>...

may be raised only by motion before trial.. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the Court for cause shown may grant relief from the waiver. Lack of jurisdiction...shall be noticed by the court at any time during the pendency of the proceeding. (emphasis added)

The burden of the government's argument on the issue of waiver seems to be that this was a procedural defect or one which relates to defects in the selection of the Grand Jury. The Fein case says more than that. It says that the Grand Jury expired after eighteen months and that new life could not be breathed into it by its own presumption to function after death. The Fein case says that the Grand Jury presumption to act after its legal death was a jurisdictional defect and hence not cured by a plea to it and that Rule 12(b)(2) expressly gives the Court the power to notice this defect at any time during the pendency of the proceeding.

It avails the government nothing to suggest that "the defendant's plea of guilty eliminates any possible claim that he was indicted unjustly."[3]

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3 See Appellant's brief page 6.

See, WRIGHT, FEDERAL PRACTICE AND PROCEDURE (CRIMINAL) Section 538 p. 473, "whatever may be the case after sentence has been imposed, the guilt or innocence of the accused should have no relevance to a pre-sentence motion." c.f. BISHOP v. U.S. C.A. 1965 349 F.2d 220, 221.

In permitting the defendant to withdraw his plea of guilty the Court did no more than recognize that it had permitted him to plead guilty to a nullity and the withdrawal rectified that error. Inasmuch as the Court below concluded that it lacked jurisdiction by virtue of this fundamental defect in the indictment, it was not bound to prevent the defendant from withdrawing his plea simply because he had not asserted such claim within "a reasonable time". Such claim being one which could be raised at any time.

The Court below did not permit the defendant to withdraw his plea in order to undermine the government's argument with respect to the effect of such plea as a waiver. Obviously the withdrawal of the plea eliminates the issue of waiver. But this consideration is somewhat tangential to the decisive issue which is that the indictment filed by this Grand Jury was a nullity; was void ab initio; was not such an act as could ever grant jurisdiction over the defendant; and this defect was one which could never be waived by a plea.

POINT II

THE DISTRICT COURT IN THE EXERCISE OF ITS DISCRETIONARY POWER PROPERLY PERMITTED THIS DEFENDANT TO WITHDRAW HIS PLEA OF GUILTY PRIOR TO SENTENCE.

Wright on Federal Practice and Procedure (Criminal) Section 538, states that Rule 32d provides that after sentence has been imposed withdrawal of a plea of guilty or nolo contendere will be allowed only "to correct manifest injustice". It makes no such limitation on the withdrawal of the plea prior to sentence. Thus the rule clearly recognizes an important distinction, depending on the stage at which withdrawal is sought.

After quoting Judge Browning for the Ninth Circuit in KADWELL v. U.S. 315 F.2d 667 on the distinctions between the withdrawal of a plea prior to sentence or after sentence Professor Wright states "in the light of this distinction, clearly expressed in the rule, it would seem that if leave to withdraw the plea is sought before sentencing, such leave should be freely allowed."

The government seems to suggest that the onus is upon

this defendant to justify the withdrawal of his plea prior to sentence. The cases and the law seem to hold to the contrary.

"It would seem that a sounder view, supported both by the language of the rule and by the reasons for it, would be to allow withdrawal of the plea prior to sentencing unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea." WRIGHT SUPRA at Section 538, page 474.

The government has not established that it will suffer substantial prejudice because of defendant's withdrawal of his plea. The case is stale, but it was stale to begin with. At the time of the withdrawal of the plea the statute of limitations had not expired and the government could have re-indicted. The witnesses who were presumably assembled for such purpose were no less readily available at that time. To prevent the Court from permitting the withdrawal of the plea is to deny to the District Court its discretionary power to permit such withdrawal where appropriate prior to sentence.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT TO PERMIT THE WITHDRAWAL OF THE PLEA OF GUILTY MADE BY THE DEFENDANT MACKLIN AND THE COURT'S DECISION TO DISMISS THE INSTANT INDICTMENT BY VIRTUE OF THE FACT THAT THE LIFE OF THE GRAND JURY WHICH PURPORTEDLY RENDERED SUCH INDICTMENT HAD EXPIRED SHOULD BE IN ALL RESPECTS AFFIRMED.

Dated: July 7 , 1975.

Respectfully submitted

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EASTERN DISTRICT
OF NEW YORK

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